

FOX GROUP LEGAL

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**FOX GROUP****FACSIMILE COVER PAGE**

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RE: Press - Linking Issues

FYI - this article was circulated by Karen Elliott from Universal (who is on the Anti-Piracy Litigation Committee).

FOX 00435

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HOLLYWOOD VS. THE FIRST AMENDMENT, PART I

The Motion Picture Association of America (MPAA) has a long and generally distinguished history of defending the First Amendment rights of filmmakers, as well as those who market films to the public, such as video retailers.

Yet as with many things in the entertainment and media world, that honorable tradition of defending First Amendment freedoms is being strained in the age of the Internet.

In January, the MPAA trumpeted an early sound courtroom victory when it persuaded a federal district judge in New York to grant it a preliminary injunction against Web site operators who posted the DeCSS utility. Developed by a hacker in Norway, the utility allows users to disable the encryption codes used to restrict access to DVDs to authorized users.

DeCSS partisans claimed the utility was developed solely so DVDs could play on computer drives running the Linux operating system, for which no authorized decryption protocol has been written.

Yet the court accepted the MPAA's claim that DeCSS could permit rampant digital piracy of DVDs and that post-

ing it should be banned pending trial. Under the Digital Millennium Copyright Act (DMCA) passed in October 1998, it's illegal to sell or distribute any service or device whose primary purpose is to circumvent technological measures used to protect access to copyrighted material.

Fair enough, but the MPAA didn't stop there. Just days after being granted the injunction, it filed an amended complaint, asking

the court also to ban any Web site that merely provided a link to those that might be posting the DeCSS utility.

In addition to other hacker sites, the complaint covered the Web sites of news organizations, educational institutions and political advocacy groups that included a link to a DeCSS site in the course of reporting on the case.

Anyone linking to another Web site at all, in fact, if that site ever posted the DeCSS utility, would be liable under the injunction the MPAA sought, whether they were aware of everything contained on the linked site or not.

Legal maneuvering aside, the case provides a perfect illustration of the problems involved in balancing copyright interests with First Amendment interests in a digital environment.



While the MPAA
makes SUNDERLAND

argument against

DeCSS (although it's not at all clear it will carry the day with a jury or in higher courts), the notion that a Web site operator should be held liable for everything and anything another operator does, simply because one site provides a link to the other, is dangerous and absurd.

It really can't be in the interests of producers of creative content such as the movie studios to insist on that kind of vicarious liability. Certainly not at a time when some would like to hold filmmakers themselves liable for the actions of those who see their movies, as in the case of suits brought against Warner Bros. and Oliver Stone over *Natural Born Killers*.

On some level, even the MPAA appears to understand that. If you go to its Web site (www.mpa.org) you'll find the text of its original complaint against the DeCSS sites, as well as the judge's order granting an injunction against posting the utility.

However, you won't find any reference to the amended complaint seeking an injunction against linking to a DeCSS site. For that, you have to go to the plaintiffs or their supporters, such as the Electronic Frontier Foundation (www.eff.org).

Perhaps even the MPAA is embarrassed by what it's doing, as of course it should be.

The battle between copyright and the First Amendment is only just beginning. On Oct. 28, the final provisions of the DMCA are scheduled to go into effect, including a provision that makes the act of circumventing access control technologies illegal. For now, only distributing a device or service designed to make circumvention possible is illegal.

At the direction of Congress, the U.S. Copyright Office is to determine whether any class of products ought to be exempted from the circumvention prohibition.

In preparation for hearings scheduled for May, the Copyright Office is currently soliciting comments from the public. Partly as a result of the MPAA's aggressive tactics, the office has been flooded with arguments from various parties saying all DVDs should be exempt, because copyright holders are already trying to use the law to trample free expression.

Next week, the battle over DMCA. ■

Paul Sweezy (psweezy@cahners.com) also writes a weekly column for Variety.

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